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12 ATTORNEYS FOR PLAINTIFF RICHARD  
13 NOLL AND PLAINTIFF/INTERVENOR  
14 RHYTHM MOTOR SPORTS, LLC

15 IN THE UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

17 RICHARD NOLL, Individually and on )  
18 behalf of all others similarly situated, )

19 Plaintiff, )

20 AND )

21 RHYTHM MOTOR SPORTS, LLC, )  
22 Individually and on behalf of all others )  
23 similarly situated, )

24 Plaintiff/Intervenor, )

25 v. )

26 EBAY INC., )

27 Defendant. )

CASE NO. 5:11-CV-04585-EJD

**PLAINTIFF/INTERVENOR'S  
ORIGINAL CLASS ACTION  
COMPLAINT IN INTERVENTION**

Jury Trial Demanded

1 Plaintiff/Intervenor Rhythm Motor Sports, LLC (“Rhythm”), individually and on behalf  
2 of all those similarly situated, brings this complaint in intervention for damages and injunctive  
3 relief against Defendant eBay Inc., and states:<sup>1</sup>

#### 4 **I. INTRODUCTORY STATEMENT**

5 Rhythm asserts its claims individually and on behalf of all other persons who paid listing  
6 fees in excess of those promised and agreed to on websites wholly owned and operated by  
7 Defendant eBay Inc. (“eBay”). As set forth more fully below, Rhythm seeks a declaration  
8 construing the web pages that establish the so-called “Good ’Til Cancelled” listing fees and  
9 monetary damages arising from eBay’s practice of systematically repeating charges for these  
10 listings.  
11

#### 12 **II. PARTIES**

13 **1. Rhythm.** Rhythm Motor Sports LLC is an Arizona limited liability company that  
14 has sold on eBay for over four years. Rhythm is typical of the Class insofar as it has been forced  
15 to pay fees in excess of those promised and agreed to by eBay.  
16

17 **2. Noll.** Richard Noll (“Noll”) is the original plaintiff in this case. Rhythm is a  
18 member of the proposed class alleged in Noll’s Original Complaint.

19 **3. eBay.** eBay is a Delaware corporation with its principal office at 2145 Hamilton  
20 Avenue, San Jose, California 95125. eBay has appeared and may be served via its counsel.

#### 21 **III. JURISDICTION AND VENUE**

22 **4. Subject Matter Jurisdiction.** This Court has subject matter jurisdiction pursuant  
23 to 28 U.S.C. § 1332(d)(2) because this case is filed as a class action under Fed. R. Civ. P. 23 and  
24 the aggregate amount in controversy exceeds the sum of \$5,000,000.00, exclusive of interest and  
25

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26 <sup>1</sup> This Complaint in Intervention is filed pursuant to the Court’s Order Granting Rhythm Motor Sports LLC’s Motion  
27 to Intervene and Denying Defendants’ Motion to Dismiss as Moot (Docket Item No. 83). In accordance with that  
28 Order, Plaintiffs will file a Consolidated Complaint by no later than October 2, 2012.

1 costs, and a substantial number of members of the class are citizens of a state different from  
2 California.

3       **5.     Venue.** Venue is proper in this district and division under 28 U.S.C. § 1391(a)  
4 because (1) eBay resides in this judicial district; (2) a substantial part of the events or omissions  
5 giving rise to the claims asserted herein occurred in this judicial district; and (3) eBay is subject  
6 to personal jurisdiction in the Northern District of California.  
7

8       **6.     Intra-District Assignment: San Jose.** Pursuant to Local Rules 3-2(c) and 3-5(b),  
9 a substantial part of the events or omissions giving rise to the claims asserted herein occurred in  
10 Santa Clara County, where eBay is located, and this case should be assigned to the San Jose  
11 division pursuant to Local Rule 3-2(e).  
12

#### 13                               **IV. PROCEDURAL BACKGROUND**

14       **7.**     On September 15, 2011, Plaintiff Richard Noll (“Noll”) filed this class action  
15 lawsuit asserting claims against eBay arising from the fees charged for Good ’Til Cancelled  
16 listings.

17       **8.**     When this lawsuit was first filed, Noll sued on behalf of a putative class defined  
18 as follows:

19               All eBay members subject to the eBay User Agreement who, on and after  
20 September 16, 2008:

21               **a.**     placed GTC Listings on eBay.com, eBay Stores, or eBay Motors; and  
22

23               **b.**     were charged at any time after the initial listing:

24                       **(i)**     Listing Fees during the No Recurring Charge Period; and/or

25                       **(ii)**    any other Fees (excluding Final Value Fees) in excess of  
26                               Insertion Fees during the applicable Insertion Fee Only Period.  
27  
28

1           **9.**       On April 23, 2012, the Court ruled that Noll “has no standing to bring claims  
2 against eBay Motors and eBay Stores” and therefore granted eBay’s motion to dismiss the  
3 “claims against these entities.”<sup>2</sup> The Court also held that “Because Plaintiff plainly states that he  
4 did not have any listings on eBay before September 2010, Plaintiff did not suffer any injury during  
5 the ‘No Recurring Charge Period’ and has no standing to bring claims regarding improper Insertion  
6 Fees from September 16, 2008 through December 16, 2008.”

7  
8           **10.**     During the class period defined in Noll’s Original Complaint, Rhythm placed  
9 Good ‘Til Cancelled listings on eBay within several different merchandise categories, including  
10 standard eBay.com categories, eBay Motors categories, and eBay Stores. Thus, Rhythm is a  
11 member of putative class in this Lawsuit, both as it was originally defined and as it was later  
12 effectively modified by the Court’s ruling on eBay’s Motion to Dismiss. Like Rhythm, many  
13 other eBay sellers undoubtedly placed Good ‘Til Cancelled listings not only in standard  
14 eBay.com categories, but also in eBay Motors categories and/or through eBay Stores.

15  
16           **11.**     The Court’s dismissal of Noll’s claims to the extent he intended to represent class  
17 members regarding listings from September 16 – December 16, 2008, and at all times for eBay  
18 Motors and eBay Stores listings affected the rights of Rhythm and others similarly situated and  
19 effectively meant that only a portion of their Good ‘Til Cancelled damages could or would be

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20  
21 <sup>2</sup> The Court apparently concluded that eBay Motors and eBay Stores are separate, independent entities from eBay  
22 and that Noll had asserted separate, independent claims against those entities. Noll did not assert distinct claims  
23 “against eBay Motors and eBay Stores.” Rather, as alleged herein and in Noll’s complaint, eBay Motors and eBay  
24 Stores are not distinct entities from eBay; Noll merely defined the class that he intended to represent as sellers with  
25 listings that were included in those particular merchandise categories, just as the class encompassed all other eBay  
26 merchandise categories. eBay Motors and eBay Stores are simply two additional formats available to sellers using  
27 eBay’s integrated websites. eBay Motors is the name applied to the merchandise categories on eBay that comprise  
28 vehicles and vehicle-related merchandise, such as parts and accessories. Similarly, eBay Stores is simply a way for  
sellers to gather and display in one place all of their eBay listings that would otherwise be displayed in various  
different eBay categories. In any event, both eBay Motors and Stores listings are governed by the same User  
Agreement as listings all other eBay listings. Although different Fees Schedules apply to those transactions, all of  
these schedules fall under and are incorporated into the same, uniform User Agreement. In other words, there is  
only one contract (as amended over time) at issue for all of the various types of listings, and eBay Inc. is a party to  
and liable under that contract for overcharges stemming from undisclosed recurring charges in connection with all  
listings that used the Good ‘Til Cancelled duration.

1 addressed in that suit. Consequently, to remedy the Court's apparent concerns or belief about  
2 Noll's legal standing with respect to such claims, Rhythm intervenes as a Plaintiff to bring claims  
3 for all listings of any kind on eBay, including in the Motors and Stores categories, beginning  
4 September 16, 2008.

5  
6 **12.** Rhythm alleges that his claims relate back to the filing of Noll's original  
7 complaint and/or that any statute of limitations was tolled by the pendency of Noll's Complaint.

## 8 **V. BACKGROUND FACTS**

9 **13. eBay's Business.** According to eBay's 2010 Form 10-K, eBay "connects millions  
10 of buyers and sellers globally on a daily basis through eBay, the world's largest online  
11 marketplace." At the end of September, 2011, eBay had almost 99 million active users (*i.e.*,  
12 persons who bid on, bought, listed or sold an item during the preceding 12-month period).

13  
14 **14. Core eBay, eBay Motors, and eBay Stores.** During the Class Period, eBay  
15 operated an integrated internet business utilizing different internet Uniform Resource Locators  
16 ("URLs"), including [www.ebay.com](http://www.ebay.com) (also known as "Core eBay"), [www.ebay.com/motors](http://www.ebay.com/motors)  
17 (formerly [www.motors.ebay.com](http://www.motors.ebay.com) and collectively "eBay Motors"), and [stores.ebay.com](http://stores.ebay.com) ("eBay  
18 Stores"). eBay Motors is a listing category within eBay's website that encompasses vehicles and  
19 vehicle-related merchandise; for purposes relevant to this case, it is not functionally different  
20 from any of the thousands of other merchandise categories within eBay. In fact, listings in the  
21 eBay Motors category are fully and functionally integrated into Core eBay. eBay Stores is  
22 simply an additional eBay feature that sellers can employ to gain more exposure to buyers. eBay  
23 Stores listings are searchable from Core eBay in the applicable category. In addition, a particular  
24 seller's eBay Stores listings can be gathered on a single web page so that buyers can readily find  
25 them in one location. Listings that appear in eBay Stores are created in exactly the same manner  
26 as all other eBay listings and simultaneously also appear on the regular eBay web pages within  
27  
28

1 their applicable eBay merchandise category. All of eBay’s various web pages are interconnected  
2 and controlled solely by eBay.<sup>3</sup> All listings placed by eBay sellers are placed with the same  
3 entity, eBay, and all related fees for those listings are paid only to eBay, regardless of which  
4 product category a particular listing may appear in, including listings appearing in the eBay  
5 Motors and eBay Stores categories. eBay Motors and eBay Stores are not separate or distinct  
6 entities from eBay, nor do they have differing contractual arrangements with members of the  
7 Class. Rather, listings placed by sellers in the eBay Motors and eBay Stores categories are no  
8 different from listings placed within other categories of eBay’s integrated online business and all  
9 of those listings are governed by the same identical contract of adhesion between eBay and each  
10 Class member.<sup>4</sup>

12 **15. Common Databases for All Users.** On information and belief, all data for all  
13 users, including listings and fees charged, are contained in a single database system common for  
14 all eBay URLs.

16 **16. eBay Membership and User Agreement.** In order to list items for sale, eBay  
17 requires sellers on the web sites listed above to first become “members” of eBay by accepting the  
18 User Agreement located at <http://pages.ebay.com/help/policies/user-agreement.html> (the “User  
19

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21 <sup>3</sup> In many instances, because of the common web design, format, and interconnectedness of the different eBay web  
22 pages, users navigating within the eBay website cannot readily discern whether they are on a web page that is  
23 technically within the Core eBay, eBay Motors, or eBay Stores areas of the eBay online marketplace unless the user  
(1) pays specific attention to the URL of the particular webpage he is viewing and (2) has a full understanding of the  
organizational structure of eBay’s web pages.

24 <sup>4</sup> Rhythm’s Good ’Til Cancelled listings on eBay have included listings within standard Core eBay merchandise  
25 categories, eBay Motors categories, and eBay Stores. As noted above, eBay Motors and eBay Stores are not  
26 separate entities from eBay and are not separately named defendants in this action. Regardless of whether a listing  
27 is technically placed in an eBay Motors category or whether that listing also appears in an eBay Stores in addition to  
the standard eBay category, the fees associated with those listings are all paid to eBay pursuant to the same contract  
that applies to all Class members. Furthermore, as shown below, the manner in which eBay has breached the  
contract is identical regardless of where or how a particular listing was initially placed. The breach occurred when  
eBay charged recurring Good ’Til Cancelled listing fees.

1 Agreement”). The User Agreement is a contract of adhesion and its terms are not negotiable by  
2 prospective eBay members. The User Agreement, effective August 13, 2008, states:

3 By using the services on the eBay websites (eBay.com and other related  
4 websites where this agreement appears), you are agreeing to the following  
5 terms, including those available by hyperlink, with eBay Inc. . . . .

6 In the latter part of 2009, eBay amended the User Agreement, deleting the reference to  
7 hyperlinks:

8 By using eBay (including eBay.com and its related sites, services, and  
9 tools), you agree to the following terms with eBay Inc. . . . .

10 Among other things, the User Agreement contains a California choice of law provision and a  
11 forum selection clause designating courts located in Santa Clara, County, California as the  
12 exclusive forum for litigating disputes with eBay<sup>5</sup>.

13 **17. Fees Schedule Web Pages.** The User Agreement states that eBay will charge  
14 sellers based upon its “Fees schedule,” which is a hyperlink that leads to other web pages that  
15 describe and quantify the applicable fees. The immediate link is to a page entitled “eBay.com  
16 Fees,” which (1) begins with two links to fee pages for listings placed in the eBay Motors and  
17 eBay Stores categories; and (2) goes on to describe the general fees for listings in eBay  
18 categories other than eBay Motors and eBay Stores. See  
19 <http://pages.ebay.com/help/sell/fees.html> (the “eBay.com Fees Schedule”),  
20 <http://pages.ebay.com/help/sell/motorfees.html> (the “eBay Motors Fees Schedule”), and  
21 <http://pages.ebay.com/help/sell/storefees.html> (the “eBay Stores Fees Schedule”) (collectively  
22 the “Fees Schedules”). Collectively, the User Agreement and the Fees Schedules comprise the  
23 operative contractual documents for identifying and calculating the fees for listing and selling  
24 items on eBay. For pleading purposes, Rhythm incorporates by reference the User Agreement  
25  
26

27 <sup>5</sup> On or about August 21, 2012, eBay purported to post an amended User Agreement to impose Utah law, a Utah  
28 forum, and to require all users to waive the right to bring a class action in favor of a individual arbitrations.

1 and linked Fees Schedules and all applicable versions thereof during the Class Period defined  
2 below, so long as the web pages were readily accessible to Rhythm and the proposed Class.

3       **18. eBay's Listing Formats.** Sellers can list their merchandise for sale in different  
4 formats, including as an "Auction-Style Listing" or as a "Fixed-Price Listing". Under the  
5 Auction-Style Listing, the sale goes to the highest bidder at or above the minimum opening  
6 price, provided any reserve is met. In a Fixed-Price Listing, a buyer willing to pay the seller's  
7 asking price can immediately consummate the transaction, rather than waiting for the listing  
8 duration to expire.

9  
10       **19. Listing Duration.** Every listing has a specified duration selected by the seller,  
11 typically 1, 3, 5, 7, or 10 days. Beginning on or about September 16, 2008, eBay added two  
12 more options for Fixed-Price Listings: (i) a 30-day listing, and (ii) "Good 'Til Cancelled"  
13 ("GTC Listings").

14  
15       **20. Fees Schedules.** On information and belief, eBay regularly reviewed and revised  
16 the Fees Schedules, as the available internet archives show many different versions of these  
17 pages. Thus, eBay's drafting of these pages was not accidental, but was deliberate and  
18 intentional, especially as to the following:

19           **a. Basic Fees and Optional Feature Fees.** The Fees Schedules define two  
20 distinct categories of fees, Basic fees ("Basic Fees") and Optional feature fees ("Optional Feature  
21 Fees"). The Basic Fees consist of the Insertion Fee and the Final Value Fee.<sup>6</sup> An Insertion Fee is  
22 a mandatory fee eBay charges for placing a listing. The Optional Feature Fees permit sellers to  
23 "add optional features to help increase bid activity ... and chances for a successful sale" at an  
24 additional cost. The Fees Schedules state that Insertion Fees and Optional Feature Fees "are  
25  
26

27 <sup>6</sup> eBay charges the Final Value Fee only if the item sells or receives a suitable bid and, depending on the type of  
28 item, that amount varies with the sales price. Final Value Fees are not the subject of this action.



1 charged at the time of listing and are non-refundable.” The Insertion Fee and Optional Feature  
2 Fees thus comprise the total fee eBay charges sellers at the time of listing (collectively, the  
3 “Listing Fees”).

4 (i) **Insertion Fee.** The amount of the Insertion Fee is contained in a  
5 specific table on each Fees Schedule. For example, the version of the eBay.com Fees Schedule  
6 hyperlinked to the User Agreement on September 16, 2008, contains a section entitled “Basic  
7 fees,” which provides: “When you list an item on eBay, you’re charged an Insertion Fee.” This  
8 section contains a table that sets forth how Insertion Fees are calculated for Fixed-Price Listings:  
9

10

Insertion Fees: Fixed Price		
Starting Price	Books, Music, DVDs & Movies, Video Games <sup>1</sup>	Other Categories
\$1.00 and Above	\$0.15	\$0.35

11  
12  
13  
14

15 Consequently, the eBay.com Fees Schedule sets \$0.35 (later raised to \$0.50) as the maximum  
16 Insertion Fee for a Fixed-Price Listing. The Insertion Fees for merchandise listed in the eBay  
17 Motors Parts & Accessories category are identical to those for eBay, as the eBay Motors Fees  
18 Schedule incorporates by reference the eBay Fees Schedule Insertion Fees.  
19

20 (ii) **Optional Feature Fees.** Importantly, all of the Fees Schedules  
21 have Optional Feature Fees defined separately from the Basic Fees. In particular, Optional  
22 Feature Fees are described in tables distinct and separate from the tables for Basic Fees. By way  
23 of example, perhaps the largest subcategory of Optional Feature Fees is the table setting forth  
24 “Listing Upgrade Fees,” which vary depending on the listing type:  
25  
26  
27  
28

▼ Listing Upgrade Fees

Feature	Fee -- Auction Style, Fixed Price Format (3, 5, 7, 10 Days)	Fee -- Fixed Price (30 Days, Good 'Til Cancelled), Classified Ad
Value Pack	\$0.65	\$2.00
Gallery*	Free	Free
Gallery Plus	\$0.35	\$1.00
Listing Designer**	\$0.10	\$0.30
Subtitle	\$0.50	\$1.50
Bold	\$2.00	\$4.00
Scheduled Listings	\$0.10	\$0.10
Gift Services	\$0.25	\$0.75
Border	\$4.00	\$8.00
Highlight	\$5.00	\$10.00
Gallery Featured	\$24.95	\$74.95
Home Page Featured	\$59.95	\$179.95
List in Two Categories***	x2	x2

Other subcategories of Optional Feature Fees include: (1) Reserve Fees; (2) Buy It Now Fees; (3) Featured Plus!; (4) Pro Pack; (5) International Site Visibility; (6) eBay Picture Hosting Fees; and (7) Seller Tool Fees. The eBay Motors and Stores Fees Schedules have Optional Feature Fees segregated from Insertion Fees; the subcategories of fees are for the most part identical.

(iii) **Listing Fees.** The Listing Fees, comprised of the Insertion Fee and any Optional Feature Fees, are expressly charged by eBay “at the time of listing;” Rhythm and the Class complain that eBay improperly re-charged some or all of these fees every 30 days for GTC Listings.

b. **GTC Listings and Recurring Charges.** On information and belief, eBay has always charged recurring fees every 30 days for GTC Listings that are not canceled. In addition, eBay at times changed Listing Fees after GTC listings were placed and charged the new fees instead of the fees that applied when the listing was placed. For example, eBay repeatedly charges the Insertion Fee and some or all Optional Feature Fees every 30 days; however, these recurring charges were not revealed in all of the applicable Fees Schedules. As of September 16, 2008, when the GTC option was introduced for Fixed Price Listings, there was no mention in the

User Agreement or eBay and eBay Motors Fees Schedules of any recurring charges for GTC Listings. The only time Listing Fees were supposed to be imposed was at the time a listing was initially placed: “Insertion fees and optional feature fees are charged at the time of listing and are nonrefundable.”

The eBay Stores Fees Schedule in effect as of September 16, 2008, did provide for some recurring fees. For example, the eBay Stores Listing Upgrade Fees table sets out the following fees every 30 days:

Listing Upgrade Fees		
Features	30 days	Good ‘Til Cancelled (recurring 30-day listing)
<u>Gallery</u>	Free	Free
<u>Gallery Plus</u>	\$0.35	\$0.35 / 30 days
<u>Subtitle</u>	\$0.02	\$0.02 / 30 days
<u>Listing Designer</u>	\$0.10	\$0.10 / 30 days
<u>Scheduled Listings</u>	\$0.10	\$0.10
<u>Bold</u>	\$1.00	\$1.00 / 30 days
<u>Border</u>	\$3.00	\$3.00 / 30 days
<u>Highlight</u>	\$5.00	\$5.00 / 30 days

Consistent with this table is nearby verbiage that “Good ‘Til Cancelled will be charged the relevant fees every 30 days.” These disclosures were absent from the substantially identical tables in the eBay and eBay Motors Fees Schedules. However, as explained below, eBay removed the disclosure of these recurring fees from the eBay Stores Fees Schedule in 2010.

c. **Recurring Charges Limited to Insertion Fee.** Sometime after September 16, 2008, eBay revised the eBay User Agreement to reveal some recurring charges every 30 days for GTC Listings in Core eBay merchandise categories. A statement was buried within several other paragraphs under the heading “**A note about eBay fees**” on the eBay.com Fees Schedule:

1 Good 'Til Cancelled renews automatically every 30 days until the item  
2 sells or you end the listing. *Insertion fees* are charged every 30 day  
period.

3 (emphasis added). This statement did not appear, however, on the eBay Motors Fees Schedule  
4 until 2010, when eBay buried similar language in a section literally entitled "**The fine print.**" At  
5 about the same time in 2010, eBay fundamentally changed the eBay Stores Fees Schedule by  
6 (i) changing how it listed fees from an amount to be charged every 30 days (*e.g.*, "\$.35 / 30  
7 days") to a flat rate for GTC Listings without mentioning a time period (*e.g.*, "\$.35") and  
8 (ii) dropping the earlier reference to recharging "relevant fees" every 30 days in favor of a  
9 provision reading substantially the same as the excerpt set forth above, *i.e.*, noting that only  
10 Insertion Fees would be charged every 30 days. Importantly, none of eBay's defective Fees  
11 Schedules, regardless of the time period involved, state that eBay would charge Optional Feature  
12 Fees every 30 days.  
13

14  
15 **d. eBay Finally Publishes Recurring Fees.** During the summer 2012, eBay  
16 revised its User Agreement and incorporated Fees Schedules as follows

17 **Other terms**

18 \* \* \*

- 19
- 20 • Good 'Til Cancelled listings renew automatically every 30 days unless  
21 all of the items sell, you end the listing, or the listing violates an eBay  
22 policy. Insertion fees *and optional feature fees* are charged every 30-  
day period. *Fee amounts are based on the terms in effect when the  
listing goes live, and when it renews.*

23 (emphasis added) This new language in the Fees Schedules shows that it was feasible for eBay to  
24 have made it clear that all fees, including Optional Feature Fees, could have been disclosed  
25 earlier and that Rhythm reasonably relied on the omission of this language.  
26  
27  
28

1           **21.     Summary of Promised and Agreed Fees for GTC Listings.**

2           **a.     No Recurring Charge Period.** As set forth more fully above, as of  
3 September 16, 2008, the eBay.com and eBay Motors Fees Schedules did not mention any  
4 recurring charges for GTC Listings (*i.e.*, no recurring Insertion Fees or Optional Feature Fees).  
5 On December 16, 2008, eBay added the verbiage “Insertion fees are charged every 30 day  
6 period” to the eBay Fees Schedule, although this language was buried under headings entitled “**A**  
7 **note about fees**” or “**The fine print**,” far from the Fees Schedules’ tables of Insertion Fees. The  
8 same verbiage was added to the eBay Motors Fee Schedule in 2010. Rhythm contends this  
9 statement was in fact intended by eBay to prevent sellers from learning about or knowingly  
10 agreeing to recurring charges. The time period from September 16, 2008, until the change to the  
11 Fees Schedules, is referred to herein as the “No Recurring Charge Period.”  
12

13           **b.     Insertion Fee Only Period.** Even when eBay added verbiage about  
14 recurring charges for GTC Listings, this verbiage mentioned only Insertion Fees, not Optional  
15 Feature Fees. This additional verbiage should not relieve eBay of liability for charging recurring  
16 fees, however. The time period after eBay added the verbiage “Insertion fees are charged every  
17 30 day period” to each Fees Schedule is defined herein as the Insertion Fee Only Period.  
18 Eventually, eBay’s Fees Schedules contained language that eBay imposes all Listing Fees,  
19 including Optional Feature Fees, every 30 days for GTC Listings.  
20

21           **22.     eBay Charged Incorrect Fees to Sellers.** eBay has consistently overcharged  
22 Listing Fees on GTC Listings as follows:  
23

- 24           · eBay improperly charged all Listing Fees every 30 days for GTC  
25           Listings during the No Recurring Charge Period; and/or
- 26           · eBay improperly charged all Listing Fees, especially fees in addition  
27           to Insertion Fees, every 30 days for GTC Listings during the Insertion  
28           Fee Only Period.

1           **23.    eBay’s Agreements, Policies, and Practices Are Identical for All Class**  
2 **Members.** All of the foregoing allegations are based entirely upon eBay’s published Fees  
3 Schedules from its website. There are no variations whatsoever between and among the  
4 agreements with, and representations made to, Rhythm or any Class member as to those fees; the  
5 Fees Schedules should therefore be interpreted uniformly as to all Class members. Moreover,  
6 the eBay User Agreement has a California choice of law provision. California law may therefore  
7 be applied to claims of all Class members.  
8

9           **24.    Examples of Rhythm’s Typical and Common Experience with eBay.** During  
10 each month of the Class Period Rhythm placed GTC Listings within standard eBay.com  
11 categories, eBay Motors categories, and/or eBay Stores and it regularly included Optional  
12 Features in those listings. Rhythm reviewed and relied on the User Agreement and the  
13 applicable Fees Schedule in existence at the time of each listing to fully and conspicuously  
14 disclose all fees. In particular, Noll Relied on the User Agreement and linked eBay, eBay  
15 Motors, and eBay Stores Fees Schedules to set forth all fees associated with listing items for sale  
16 on eBay. The eBay Fees Schedule states that the “Basic fees” consist of an Insertion Fee and  
17 Final Value Fee and that the “total cost of selling an item is the Insertion Fee plus the Final Value  
18 Fee.” The Fees Schedule also states that the Insertion Fee is charged “when you list an item ... .”  
19 Rhythm relied on this language and the tables of Insertion Fees immediately below this language  
20 to set forth the amount and timing of Insertion Fees. The eBay Motors and eBay Stores Fees  
21 Schedule goes on to disclose Optional Feature Fees in tables with bold headings and highlighted  
22 titles. The Fees Schedules are the only source of information about GTC listing fees and should  
23 have contained all relevant information about the amount and timing of the fees. Alternatively  
24 and in addition, the disclosures at time of listing should have contained disclosures that GTC  
25  
26  
27  
28

1 Listing Fees would recur; there were no such disclosures. Based on the language employed in the  
2 various eBay Fees Schedules, Rhythm expected that the timing and amount of any Insertion Fees  
3 and Optional Feature Fees that would ever be charged for its listings would appear in the tables  
4 for those fees and it therefore relied on those tables. As of September 16, 2008, the eBay Motors  
5 Fees Schedule had no mention that any fees for GTC Listings would recur and Rhythm therefore  
6 relied on that omission to believe that GTC Listings would not incur any recurring Listing Fees.  
7 eBay later changed the language regarding to GTC Listings on the eBay.com Fees Schedule, but  
8 provided no notice that the substantive terms of the User Agreement had been unilaterally  
9 changed and falsely represented to sellers on the face of User Agreement itself the last date that  
10 substantive changes had been made to the terms of the parties' agreement. In 2010, the eBay  
11 Stores Fees Schedule omitted any mention of recurring fees in the tables of Insertion and  
12 Optional Feature Fees and Rhythm therefore relied on that omission to believe that GTC Listings  
13 would no longer incur any recurring fees. In 2010, after eBay added language about recurring  
14 fees to the end of the eBay Motors and Stores Fees Schedules pages, Rhythm did not see the new  
15 language. Even if Rhythm had seen the language, it was inadequate because it at most stated that  
16 "Insertion fees are charged every 30 day period," rather than that "Insertion fees *and optional*  
17 *feature fees* are charged every 30-day period." Rhythm's reliance on this omission was  
18 reasonable, because eBay itself recognized the need for improved verbiage. Again, eBay  
19 provided no notice that it had changed the terms of its User Agreement and falsely represented to  
20 sellers on the face of User Agreement the last date that substantive changes had been made to the  
21 terms of the parties' agreement. As of 2010, the above-referenced tables of Insertion and  
22 Optional Feature Fees in the eBay Motors and Stores Fees Schedules had no mention that any  
23 fees for GTC Listings would recur and Rhythm therefore relied on that omission to believe that  
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1 GTC Listings in Stores would not incur any recurring fees. Rhythm did not expect that the  
2 timing or amount of Listing Fees would appear at the end of the Fees Schedule in an area entitled  
3 “The fine print.” eBay’s intent to obscure the information in the “fine print” is revealed by the  
4 fact that eBay now entitles this section “Other items.” When Rhythm placed listings, eBay gave  
5 it the option to select the duration of its listings. The listing process omitted any disclosure that  
6 that GTC Listings entailed recurring charges for all Listing Fees every 30 days. Rhythm relied  
7 on this omission in placing GTC Listings. In reliance on the foregoing representations and  
8 omissions, and the name “Good ‘Til Cancelled,” Rhythm understood that GTC Listings required  
9 payment of the initial Listing Fees and that the listings would remain “good” at no extra charge  
10 until canceled or the item sold, without recurring charges of Listing Fees, with the exception of  
11 recurring insertion fees for listings made during an Insertion Fee Only Period disclosed in the  
12 applicable Fees Schedule. Rhythm therefore selected GTC for the listing duration, rather than  
13 any other duration. Had Rhythm known that GTC Listings would have recurring fees, it would  
14 not have selected the GTC option. Alternatively, Rhythm would not have selected Optional  
15 Features for its GTC Listings. The summary invoices from eBay did not reveal the recurring  
16 GTC Listing Fees. Rhythm can calculate the overcharged fees for GTC Listings from eBay’s  
17 data in the same manner as described in the paragraph above.

20       **25.     Rhythm is a Proper Representative of All Sellers.** While eBay’s fees structure  
21 charges different monetary amounts for listings based on a variety of different factors, including,  
22 for example, which merchandise category the listing is placed in, the duration of the listing, the  
23 listing format, and other options, eBay’s obligation not to charge sellers improper recurring fees  
24 for GTC listings are the same regardless of which Fees Schedule applies to a particular listing.  
25 Thus, Rhythm is a proper representative to bring claims on behalf of all sellers for excessive fees  
26  
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1 charged by eBay for GTC listings that are subject to the eBay.com Fees Schedule, the eBay  
2 Motors Fees Schedule, and/or the eBay Stores Fees Schedule.

### 3 **VI. CLASS ACTION ALLEGATIONS**

4 **26. Class Definition.** Rhythm brings this class action pursuant to Fed. R. Civ. P. 23  
5 on behalf of the following class (the “Class”): all eBay members subject to the eBay User  
6 Agreement who, on and after September 16, 2008 (the “Class Period”):  
7

- 8 **a.** placed GTC Listings on eBay that are subject to the Fees Schedules;<sup>7</sup> and
- 9 **b.** were charged at any time after the initial listing:
  - 10 **(i)** Listing Fees; and/or
  - 11 **(ii)** Any other Fees (excluding Final Value Fees) in excess of
  - 12 Insertion Fees during the applicable Insertion Fee Only
  - 13 Period.
  - 14

15 Excluded from the Class are eBay and its management, officers, and directors, members of each  
16 of their immediate families, and any presiding magistrate or district judge and their staff.

17 **27. Class Certification.** This action may be maintained as a class action because:

- 18 **a.** The Class is so numerous that joinder of all members is impracticable;
- 19 **b.** There are questions of law or fact common to the Class;
- 20 **c.** The claims or defenses of the representative parties are typical of the
- 21 claims or defenses of the Class; and
- 22 **d.** The representatives of the Class will fairly and adequately protect the
- 23 interests of the Class.
- 24

25 **28. Declaratory/Injunctive Relief.** The Class is properly certifiable pursuant to Rule  
26 23(b)(2) because eBay has acted or refused to act on grounds that apply generally to the Class, so

27 <sup>7</sup> The Class period will need to be adjusted based on the exact content of the Fees Schedules.

1 that final injunctive relief or corresponding declaratory relief is appropriate respecting the Class  
2 as a whole.

3       **29.     Damages Class.** The Class is properly certifiable pursuant to Rule 23(b)(3) as a  
4 damages class because the questions of law and fact common to the class predominate over any  
5 questions affecting only individual members, and a class action is superior to other available  
6 methods for fairly and efficiently adjudicating the controversy. Among other things, each Class  
7 member's interest in individually controlling the prosecution of the claims herein makes it  
8 virtually impossible to assert those claims outside the class action context. Moreover, there is no  
9 other litigation known by the undersigned counsel that asserts claims based on the facts in this  
10 controversy. Concentrating litigation in this forum makes sense because it is the location of  
11 eBay's principal office and principal place of business, the forum of eBay's choice under the  
12 User Agreement, and because eBay has selected California law under the User Agreement.  
13 Finally, there are no likely difficulties in managing this case as a class action and the Plaintiffs'  
14 counsel is experienced in class actions.  
15  
16

17       **30.     Common Questions.** The common questions of law and fact include at least the  
18 following:

- 19           **a.**     The construction of the agreement between eBay and the Class members;  
20           **b.**     The Listing Fees for GTC Listings and method of calculation thereof by  
21                   eBay as to the Class;  
22           **c.**     Whether eBay has breached its agreement and covenant of good faith and  
23                   fair dealing with the Class;  
24           **d.**     Whether eBay has violated California Business & Professional Code  
25                   § 17200 *et seq.*;  
26  
27  
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- 1           e.     Whether the Fees Schedule web pages are an unlawful, unfair, or  
2                 fraudulent business practice insofar as they deviate from the fees actually  
3                 charged;  
4  
5           f.     Whether eBay was unjustly enriched by charging fees in a manner and in  
6                 excess of what it agreed to and promised for GTC Listings;  
7  
8           g.     Whether the advertised GTC fees are untrue or misleading;  
9  
10          h.     Whether charges by eBay of GTC fees greater than those advertised were  
11                 unconscionable and/or unfair;  
12  
13          i.     Whether eBay's omission from the Fees Schedules of any reference to  
14                 recurring Listing Fees or the placement of verbiage about recurring  
15                 Insertion Fees (but not Optional Feature Fees) at the end of the Fees  
16                 Schedule was untrue, misleading, unconscionable, or unfair; and  
17  
18          j.     The method of calculation of damages for members of the Class.

19           **VII. FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

20           **31.**   Rhythm re-alleges each of the preceding paragraphs as if set forth fully herein.

21           **32.**   Throughout the Class Period, eBay entered into identical contracts with Rhythm  
22           and all Class Members setting forth the fees for GTC Listings. As set forth more fully above, the  
23           User Agreement incorporates the applicable Fees Schedules. Rhythm and the Class therefore  
24           entered into unambiguous contracts with eBay to pay only the certain and defined fees for GTC  
25           Listings in the manner set forth in each Fees Schedule.

26           **33.**   eBay breached its contracts with Rhythm and the Class, and its covenant of good  
27           faith and fair dealing, by charging fees for GTC Listings in a manner different than set forth in  
28           the applicable Fees Schedules; by collecting fees in excess of those permitted by the applicable  
             Fees Schedules; and by interfering with the right of Rhythm and the Class to receive the benefits

1 under the contracts. eBay also breached its duty of good faith and fair dealing by misstating the  
2 dates on which the terms of the parties' agreement, over which eBay had unilateral control and  
3 discretion, had substantively changed, namely with respect to the terms found on each of the  
4 Fees Schedules relating to Good 'Til Cancelled listings. Furthermore, eBay improperly re-  
5 charged all Listing Fees on GTC Listings. Alternatively and in addition, eBay continues to  
6 overcharge sellers by improperly re-charging fees in excess of the Insertion Fee every 30 days on  
7 GTC Listings.  
8

9 **34.** Rhythm and the Class in no way agreed or consented to any charges above and  
10 beyond those set forth in the applicable Fees Schedules and did not agree to alter, modify, or  
11 amend their contracts with eBay. Among other things, Rhythm and the Class did not voluntarily  
12 agree to fees different from those in the applicable Fees Schedule by paying invoices prepared by  
13 eBay, regardless of whether those invoices were sent to or otherwise made available to any  
14 Rhythm or Class member.  
15

16 **35.** Alternatively and in addition, the User Agreement and applicable Fees Schedules,  
17 are contracts of adhesion that must be construed against their drafter, eBay, and in favor of  
18 Rhythm and the Class.  
19

20 **36.** Further, any and all provisions of any web page, invoice, or communication from  
21 eBay purporting to contradict or alter the terms sets out in the applicable Fees Schedules must be  
22 disregarded, construed in favor of Rhythm and Class Members, and/or declared unconscionable  
23 and unenforceable.  
24

25 **37.** As a direct and proximate result of eBay's breach of contract, and the attendant  
26 covenant of good faith and fair dealing, Rhythm and the Class have been damaged in an amount  
27 easily calculated by taking the difference between the amount of Listing Fees actually charged  
28

1 and deducting inapplicable Listing Fees pursuant to the Fees Schedule applicable at the time of  
2 the charge. The damages are readily calculable from eBay's data and the calculation is common  
3 to and typical of all Class members and readily determinable from the computer data in the  
4 possession of eBay.

### 5 **VIII. SECOND CAUSE OF ACTION – UNFAIR COMPETITION**

6 **38.** Rhythm re-alleges each of the preceding paragraphs, as if set forth fully herein.

7  
8 **39.** The California Business & Professions Code § 17200 provides that “unfair  
9 competition shall mean and include any unlawful, unfair or fraudulent business act or practice.”  
10 eBay's policy and practice regarding Listing Fees constitutes a “business practice” and is  
11 unlawful, unfair, and/or fraudulent. Beginning September 16, 2008, eBay represented and  
12 promised on the applicable Fees Schedules that GTC Listings would require the payment of  
13 Listing Fees only at the time of listing and eBay omitted any disclosure of the existence or  
14 amount of recurring fees of any kind. To the extent eBay remedied these misrepresentations and  
15 omissions, it did so inadequately in literal “fine print” designed to be overlooked by Class  
16 members. These inadequate and obscure disclosures at most revealed the recurring nature of  
17 Insertion Fees, not Optional Feature Fees. However, eBay unlawfully charged recurring Listing  
18 Fees for all GTC Listings.

19  
20 **40.** eBay's business practices described above as to GTC Listing Fees is unlawful,  
21 unfair, and/or fraudulent in that they violate at least the following laws:

22 **a.** Breach of contract and the duty of good faith and fair dealing.

23  
24 **b.** eBay's conduct constitutes unjust enrichment insofar as it charged fees in  
25 excess of those advertised and agreed to at the applicable Fees Schedule web pages.

26 **c.** eBay violated Cal. Bus. & Prof. Code § 17500 *et seq.* (“FAL”) because its  
27 representations regarding GTC Listings were untrue and misleading, and eBay knew, or by the  
28

1 exercise of reasonable care should have known, that the applicable Fees Schedules were untrue  
2 or misleading.

3           **d.**       Furthermore, eBay failed to present the automatic renewal offer terms in a  
4 clear and conspicuous manner before each GTC Listing and in visual proximity of the GTC  
5 Listing offer. Nor did eBay obtain affirmative consent to the automatic renewal offer before  
6 charging recurring GTC Listing fees. eBay also failed to alert users to material changes in the  
7 GTC Listing terms as required by the FAL. In particular, eBay's statements in the User  
8 Agreement itself regarding the last date the User Agreement was substantively changed were  
9 false and/or misleading and failed to conspicuously advise users that material changes had been  
10 made to the terms of the parties' agreement, including addition and/or modification of the terms  
11 relating to Good 'Till Cancelled recurring charges and automatic renewal, violating the FAL.  
12

13           **e.**       eBay violated Cal. Bus. & Prof. Code § 17500 *et seq.* and/or § 17507  
14 because its representations regarding GTC Listing Fees were misleading and did not clearly and  
15 conspicuously state that all Listing Fees would be re-charged every 30 days on uncanceled GTC  
16 Listings.  
17

18           **f.**       eBay violated Cal. Bus. & Prof. Code § 17507 because its representations  
19 regarding GTC Listing Fees were a "bait and switch" tactic and its advertising claims or  
20 representations did not clearly and conspicuously identify the recurring fees associated with GTC  
21 Listings.  
22

23           **g.**       eBay violated Cal. Bus. & Prof. Code § 12024.1 because it willfully  
24 misrepresented a charge for services rendered on the basis of time, measure or count via its Fees  
25 Schedules and, insofar as eBay actually charged fees premised on a different time, measure  
26  
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28

1 and/or count than represented; namely GTC Listings were “not Good ‘Til Canceled” but instead  
2 were as expensive or more expensive than traditional listings if the listing extended past 30 days.

3           **h.**       eBay violated Cal. Civ. Code § 1670.5 by, among other things, procuring  
4 contracts or contract provisions from Rhythm and the Class that were unconscionable at the time  
5 they were made and further by promising and representing that GTC Listings would be charged  
6 (at most) only Insertion Fees every 30 days, but instead repeatedly charged all Listing Fees for  
7 GTC Listings, using both its substantially greater bargaining power and greater knowledge in  
8 order to do so.

10           **41.**     Independently and in addition, eBay’s conduct described above is unfair under  
11 Cal. Bus. & Prof. Code § 17200 *et seq.* It is fundamentally unfair, contrary to public policy,  
12 immoral, unethical, oppressive, unscrupulous, and injurious to Rhythm and the Class for eBay to  
13 obscurely “disclose” recurring Insertion Fees every 30 days for GTC Listings; and then  
14 nevertheless charge all Listing Fees every 30 days. There is no justification or excuse for  
15 eBay’s practices and/or any such justification is outweighed by the consequences and harm to  
16 Rhythm and Class members. In addition, to the extent that eBay attempts to avoid its published  
17 Fees Schedules by reference to other web pages, extra-contractual communications, or portions  
18 of web pages not specifically identified within the User Agreement, that conduct is also unfair,  
19 unconscionable, and violates §§ 17200 *et seq.* In that regard, eBay’s conduct constitutes an  
20 unfair business practice for the following additional reasons:

- 23           **a.**       The consumer injury resulting from eBay’s malfeasance is substantial;
- 24           **b.**       The consumer injury is not outweighed by countervailing benefits to  
25 consumers or competition; and
- 26  
27  
28

1           c.       Consumers could not reasonably have avoided the injury caused by eBay's  
2 conduct.

3           **42.**     Rhythm and the Class are officers, persons, corporations or associations that have  
4 suffered an injury in fact and lost money or property as a result of eBay's violations of Cal. Bus.  
5 & Prof. Code § 17200 *et seq.*  
6

7           **IX. THIRD CAUSE OF ACTION - FALSE ADVERTISING LAWS**

8           **43.**     Rhythm re-alleges each of the preceding paragraphs, as if set forth fully herein.

9           **44.**     eBay violated Cal. Bus. & Prof. Code § 17500 *et seq.* because its representations  
10 regarding GTC Listing Fees were untrue and misleading, and eBay knew, or by the exercise of  
11 reasonable care should have known, that these fees were untrue or misleading.

12           **a.**       eBay violated Cal. Bus. & Prof. Code § 17500 *et seq.* and/or § 17507  
13 because its representations regarding Listing Fees were misleading and did not clearly and  
14 conspicuously state that eBay would charge recurring fees every 30 days for GTC Listings  
15 and/or that such fees would include all Listing Fees.  
16

17           **b.**       Furthermore, eBay failed to present the automatic renewal offer terms in a  
18 clear and conspicuous manner before each GTC Listing and in visual proximity of the GTC  
19 Listing offer. Nor did eBay obtain affirmative consent to the automatic renewal offer before  
20 charging recurring GTC Listing fees. eBay also failed to alert users to material changes in the  
21 GTC Listing terms as required by the FAL. In particular, eBay's statements in the User  
22 Agreement itself regarding the last date the User Agreement was substantively changed were  
23 false and/or misleading and failed to conspicuously advise users that material changes had been  
24 made to the terms of the parties' agreement, including addition and/or modification of the terms  
25 relating to Good 'Til Cancelled recurring charges and automatic renewal, violating the FAL.  
26  
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1       **45.**     eBay violated Cal. Bus. & Prof. Code § 17507 because its representations  
2 regarding Listing Fees were a “bait and switch” tactic and its advertising claims or  
3 representations did not clearly and conspicuously identify the prices associated with GTC  
4 Listings.

5       **46.**     Rhythm and the Class are officers, persons, corporations or associations that  
6 suffered an injury in fact and lost money as a result of eBay’s violation of Cal. Bus. & Prof. Code  
7 § 17500 *et seq.*

8       **47.**     eBay’s conduct described above violates Cal. Bus. & Prof. Code § 17500 *et seq.*  
9 and entitles Rhythm and the Class to restitution and injunctive relief as provided by Cal. Bus. &  
10 Prof. Code § 17535.  
11

12                   **X. FOURTH CAUSE OF ACTION -**  
13                   **UNJUST ENRICHMENT/COMMON LAW RESTITUTION**

14       **48.**     Rhythm re-alleges each of the preceding paragraphs, as if set forth fully herein.

15       **49.**     By charging fees in excess of those promised and agreed to under the applicable  
16 Fees Schedules, eBay collected fees in excess of those to which it was contractually or otherwise  
17 entitled. eBay has therefore unlawfully and unjustly enriched itself at the cost of Rhythm and the  
18 Class. Rhythm and members of the Class therefore seek an order of restitution and disgorgement  
19 of all fees eBay collected in excess of those expressly agreed to.  
20

21                   **XI. FIFTH CAUSE OF ACTION - FRAUD AND DECEIT**

22       **50.**     Rhythm re-alleges each of the preceding paragraphs, as if set forth fully herein.

23       **51.**     eBay violated Cal. Civ. Code §§ 1572 (actual fraud), 1709 and 1710, because at  
24 the time eBay published its Fees Schedules and Rhythm and the Class listed items for sale, eBay  
25 knowingly, willfully, and/or recklessly made material misrepresentations regarding the fees for  
26 GTC Listings, without any intent to charge the fees as actually stated within the applicable Fees  
27  
28

1 Schedules, and eBay instead intended to charge, and did charge recurring Listing Fees. eBay  
2 engaged in this conduct in order to induce Rhythm and Class members to list items for sale and  
3 pay the improper fees, and Rhythm and the Class reasonably relied on eBay's misrepresentations  
4 to their detriment. Rhythm and the Class therefore seek all damages proximately caused by eBay  
5 as a result of this wrongful conduct.  
6

## 7 **XII. SIXTH CAUSE OF ACTION - DECLARATORY JUDGMENT**

8 **52. Declaratory Relief.** Pursuant to 28 U.S.C. §§ 2201-2, Rhythm and the Class  
9 state that an actual controversy with eBay exists and they seek a declaration regarding their  
10 rights and other legal relations as follows.

11 **53. Contractual Rights.** Rhythm and the Class seek a declaration construing and  
12 enforcing the User Agreement and applicable Fees Schedules for GTC Listings. Rhythm and the  
13 Class will rely on the Fees Schedules published and amended over time, including those  
14 referenced or excerpted above. In particular, Rhythm and the Class seek a declaration that GTC  
15 Listings under the applicable Fees Schedules are subject only to the initial Listing Fees, as set  
16 forth on the applicable Fees Schedule; upon automatic renewal every 30 days, there should be no  
17 further fees or, alternatively, only additional Insertion Fees and in no event any other additional  
18 fees (excluding Final Value Fees). Further, eBay's conduct is ongoing, and Rhythm therefore  
19 seeks prospective relief regarding the parties' rights and obligations under the User Agreement.  
20  
21

## 22 **XIII. MISCELLANEOUS**

23 **54. Conditions Precedent.** Rhythm and the Class hereby allege that they have fully  
24 complied with all contractual and other legal obligations and fully complied with all conditions  
25 precedent to bringing this action and/or all such obligations or conditions are excused.

26 **55. Jury Demand.** Rhythm and the Class demand a trial by jury.  
27  
28

1 **XIV. PRAYER FOR RELIEF**

2 **56.** Rhythm, on behalf of itself and on behalf of the Class, requests the following  
3 relief:

4 **a.** An order certifying the Class and appointing Rhythm as a representative  
5 of the Class and the undersigned counsel as Class Counsel;

6 **b.** Declaratory judgment interpreting the applicable Fees Schedules and the  
7 proper method of calculation of listing fees for GTC Listings and as otherwise set forth above  
8 and an injunction prohibiting eBay from charging recurring Listing Fees on GTC Listings;

9 **c.** Imposition of a constructive trust upon all the monies and assets eBay has  
10 acquired as a result of its unfair practices and fees;

11 **d.** Actual damages suffered by Rhythm and the Class and/or full restitution  
12 of all funds acquired from eBay's unfair business practices, including disgorgement of profits;

13 **e.** Punitive damages, in an amount determined by the Court and/or jury;

14 **f.** Any and all statutory enhanced damages or punitive damages;

15 **g.** All reasonable and necessary attorneys' fees provided for by statute or  
16 common law;

17 **h.** Pre- and post-judgment interest; and

18 **i.** All other and further relief, general and special, legal and equitable, to  
19 which Rhythm and Class may be justly entitled.  
20  
21  
22

23 **XV. CERTIFICATION OF INTERESTED ENTITIES OR PERSONS**

24 **57.** Pursuant to Civil L.R. 3-16, the undersigned certifies that, as of this date, other  
25 than the named parties, there is no such interest to report.  
26  
27  
28

1 Dated: September 18, 2012.

2 Respectfully submitted,

3 By: /s/ Keith R. Verges

4 Keith R. Verges

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28 **ATTORNEYS FOR  
PLAINTIFF/INTERVENOR**

**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record will be served with a copy of this document via the Court's CM/ECF system pursuant to the local rules of this Court, on this 18<sup>th</sup> day of September, 2012.

/s/ Keith R. Verges

Keith R. Verges